

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE NEW ENGLAND COMPOUNDING)	
PHARMACY, INC. PRODUCTS)	
LIABILITY LITIGATION)	MDL No. 2419
<hr/>		Dkt. No. 1:13-md-2419 (RWZ)
THIS DOCUMENT RELATES TO:)	
)
All Cases Against the Specialty Surgery)	
Center Defendants)	

**PLAINTIFFS' STEERING COMMITTEE'S MOTION FOR JUDGMENT ON THE
PLEADINGS REGARDING COMPARATIVE FAULT DEFENSES ATTRIBUTING
FAULT TO GOVERNMENTAL ENTITIES**

The Plaintiffs' Steering Committee respectfully moves the Court, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for entry of partial judgment dismissing the SSC Defendants,¹ and Calisher and Associates' affirmative defenses attempting to attribute fault at trial to certain governmental entities, including the Food and Drug Administration, Massachusetts Board of Registration in Pharmacy, the Tennessee Board of Pharmacy, and the Tennessee Department of Health. As grounds for this motion, the PSC states that, under Tennessee law, fault cannot be attributed to the above-mentioned government agencies because none of those agencies owed an individual legal duty to any particular Plaintiff. Under Tennessee's public duty doctrine, the only legal duty owed by said governmental entities was owed to the general public, not to any particular individual. Accordingly, because legal duty is an essential element of fault under Tennessee law, Plaintiffs are entitled to judgment on the pleadings establishing that fault cannot be allocated to governmental entities at trial.

As grounds for this motion, the Plaintiffs' Steering Committee relies upon the contemporaneously filed Memorandum of Law and all operative pleadings filed to date.

¹ The "SSC Defendants" include Specialty Surgery Center, PLLC, Dr. Kenneth Lister, and Kenneth Lister, MD, PC.

Date: December 29, 2016

Respectfully submitted,

/s/ Benjamin A. Gastel

J. Gerard Stranch, IV
Benjamin A. Gastel
Anthony A. Orlandi
BRANSTETTER, STRANCH &
JENNINGS, PLLC
223 Rosa L. Parks Ave., Suite 200
Nashville, TN 37203
Telephone: 615/254-8801
Facsimile: 615/255-5419
gerards@bsjfirm..com
beng@bsjfirm.com
aorlandi@bsjfirm.com

Plaintiffs' Steering Committee and Tennessee State Chair

Thomas M. Sobol
Kristen Johnson Parker
HAGENS BERMAN SOBOL SHAPIRO, LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
Telephone: 617/482-3700
Facsimile: 617/482-3003
tom@hbsslaw.com
kristenjp@hbsslaw.com

Plaintiffs' Lead Counsel

Elizabeth J. Cabraser
Mark P. Chalos
LIEFF CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
Telephone: 415/956-1000
Facsimile: 415/956-1008
ecabraser@lchb.com
mchalos@lchb.com

Federal/State Liaison

Marc E. Lipton
LIPTON LAW
18930 W. 10 Mile Road
Southfield, MI 48075
Telephone: 248/557-1688
Facsimile: 248/557-6344
marc@liptonlaw.com

Kimberly A. Dougherty
JANET, JENNER & SUGGS, LLC
31 St. James Avenue, Suite 365
Boston, MA 02116
Telephone: 617/933-1265
kdougherty@myadvocates.com

Mark Zamora
ZAMORA FIRM
6 Concourse Parkway, 22nd Floor
Atlanta, GA 30328
Telephone: 404/451-7781
Facsimile: 404/506-9223
mark@markzamora.com

Patrick T. Fennell
CRANDALL & KATT
366 Elm Avenue, S.W.
Roanoke, VA 24016
Telephone: 540/342-2000
Facsimile: 540/400-0616
pfennell@crandalllaw.com

Plaintiffs' Steering Committee

CERTIFICATE OF CONSULTATION PURSUANT TO RULE 7.1

I, Benjamin A. Gastel, hereby certify that prior to the filing of this Motion, the Plaintiffs' Steering Committee attempted to meet and confer in good faith with counsel for the Specialty Surgery Center Defendants. The parties were unable to reach an agreement, thus necessitating this Motion.

/s/ Benjamin A. Gastel
Benjamin A. Gastel

CERTIFICATE OF SERVICE

I, Benjamin A. Gastel, hereby certify that I caused a copy of the foregoing document to be filed electronically via the Court's electronic filing system. Those attorneys who are registered with the Court's electronic filing system may access these filings through the Court's system, and notice of these filings will be sent to these parties by operation of the Court's electronic filing system.

Date: December 29, 2016.

/s/ Benjamin A. Gastel
Benjamin A. Gastel